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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EFRAIN G. et al., Persons Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JUAN G.,

Defendant and Appellant.

D055399

(Super. Ct. No. NJ14019A-C)

APPEAL from orders of the Superior Court of San Diego County, Michael J.

Imhoff, Commissioner. Affirmed.

Juan G. appeals orders declaring his minor children Efrain G., Aracely G., and Luis G. (together, the minors) dependents of the juvenile court under Welfare and Institutions Code section 300, subdivisions (c), (d) and (j), and removing them from his custody under section 361, subdivision (c). (All statutory references are to the Welf. and

Instit. Code.) Juan challenges the sufficiency of the evidence to support the court's jurisdictional and dispositional findings.

#### FACTUAL AND PROCEDURAL BACKGROUND

In October 2008 the San Diego County Health and Human Services Agency (the Agency) filed a petition on behalf of then seven-year-old Aracely under section 300, subdivision (d). The petition alleged Juan had sexually abused Aracely. The Agency also filed petitions on behalf of Aracely's brothers Efrain and Luis under section 300, subdivision (j) alleging the brothers were at substantial risk of similar abuse.

The Agency submitted a detention report detailing the allegations of abuse. Rocio G., Aracely's mother, took Aracely to see a doctor after she noticed her rubbing her pubic area on chairs. Rocio indicated that Aracely might be suffering from a vaginal infection. The doctor conducted a urine test and the results showed white blood cells were present in Aracely's urine. The doctor scheduled a follow up visit for two weeks later. At the follow up visit, a urine test showed that the white blood cells were still present in Aracely's urine. Rocio reported that Aracely had been rubbing stuffed animals against her vaginal area for about year and that she had recently complained about her private area itching.

The doctor asked Aracely if anyone had touched her vagina, her privates or touched her in a way she didn't like. Aracely immediately said "yes" and pointed to her vagina. The doctor questioned Aracely a second time and asked her who had touched her privates. Aracely told the doctor her father, Juan, had touched her vaginal area with his finger.

The doctor notified the authorities, and Detective Lisa Brannon investigated the allegations. Brannon advised Rocio that Juan would need to leave the family home during the investigation. Juan denied that he behaved inappropriately toward Aracely. Rocio signed a safety plan acknowledging that she should not allow Juan to have contact with Aracely.

Child abuse expert Dr. Mary J. Spencer examined Aracely and concluded that the examination results were abnormal and consistent with Aracely's statements of sexual abuse by Juan. Dr. Spencer noted the findings were "nonspecific" and could have been caused "by sexual abuse or other mechanisms."

Following the examination and initial disclosure of abuse, Rocio and Juan took Aracely to several different doctors, seeking a second opinion.

Aracely participated in a forensic interview. She believed the reason she was being interviewed was because she had been scratching herself in her vaginal area. It appeared to the interviewer, social worker Johanna Firth, and Detective Brannon that Aracely had been coached about what to say during the interview. Aracely suggested that Rocio had told her to say that she had been "scratching" her vaginal area. Aracely appeared worried and reluctant to answer the interviewer's questions. She denied anyone had touched her vagina, but she disclosed that Juan had spent the night in the family home the night before her interview and that he had eaten breakfast with the family that morning. The Agency social worker took the minors into protective custody after learning that Rocio disregarded the safety plan and had allowed Juan to return to the family home.

The court held a detention hearing and ordered the minors detained in out-of-home care. The court further ordered no contact between Aracely and Juan.

The Agency filed a jurisdiction and disposition report in November 2008. Aracely participated in a second forensic interview. During the interview Aracely stated that she told the doctor that Juan had touched her in "my body." When asked where she had been touched, Aracely pointed to her vaginal area. She stated it happened once when she was seven years old. Juan had touched her under her clothes with his hand while she was on the bed in the master bedroom. Aracely said the touching hurt her and when Juan stopped, he started to watch television. Her mother and brothers were home, but were in other rooms in the house.

The social worker spoke with Rocio and Juan concerning the allegations. Rocio did not believe Aracely's allegations of sexual abuse. Juan denied the allegations against him but admitted that he had violated the safety plan.

In an addendum report, social worker Firth reported that Aracely had disclosed the abuse by Juan to her foster mother. The foster mother reported that while Aracely had been taking a bath, she asked the foster mother if it was okay for big people to see little people naked. The foster mother explained that it was best for everyone to keep their naked bodies to themselves. The caregiver also stated it was not appropriate for anyone to touch someone's private parts. Aracely then stated her brothers did not touch her, only Juan had, and she referred to her vaginal area.

The Agency filed an additional addendum report discussing Luis and Efrain's behaviors while in foster care. Luis and Efrain had been placed in the same foster home.

Aracely had been placed in a separate home. Luis and Efrain reported that while living with their parents, they had been beaten with a belt for physical discipline and that Aracely would hide in the family truck to avoid being hit. The foster mother reported that Luis had been acting out aggressively toward the cat in the foster mother's home. Luis attempted to pull out the cat's leg. After the foster mother reprimanded him, he later tried to pull out the cat's tail. Luis told the foster mother he had broken the leg of his dog at his parents' home and that he enjoyed choking his pet bunny. The foster mother believed that Luis did not show remorse for his actions and that her attempts to modify his behavior were unsuccessful. The foster mother requested that Luis be removed from her home.

In addition to the acts of aggression toward the foster mother's cat, the foster mother reported that Luis had been acting out sexually toward Efrain. Luis would get on top of Efrain and "hump" him. The foster mother and the boys' therapist worked with Luis, and he stopped this behavior. However, the foster mother reported that Luis openly masturbated and Efrain reported that he would wake up at night because Luis would masturbate and shake the bed. The foster mother asked Luis where he learned this behavior; he replied that he learned it from his father, mother and Aracely. He denied learning it from Efrain. Firth opined that the behavioral and psychological problems present in Luis appeared to have existed before he was placed in protective custody. In addition to the behavioral problems, Luis appeared to be suffering from some cognitive and developmental delays. His therapist recommended that Luis participate in a full developmental assessment.

Firth spoke with psychologist Dr. Matt Berlin regarding Luis's behaviors. Dr. Berlin recommended that Luis participate in services. Dr. Berlin worked with Luis for seven weeks and noted that Luis was improving. Dr. Berlin observed that both Luis and Efrain appeared to be extremely competitive with one another to the point that their behaviors were interfering with their individual development. He agreed with the foster mother's request to remove Luis from the home.

Dr. Charmi Patel conducted a clinical evaluation of Luis in February 2009. Dr. Patel reported that Luis's behaviors began before his removal from his parents' care. Luis's symptoms included hyperactivity, intermittent cruelty to animals and physical and sexual aggression toward Efrain. She recommended that Luis participate in therapy to address his symptoms.

Firth noted that Rocio made little or no progress in treatment. Rocio's therapist was unwilling to recommend reunification with the minors and believed that if the minors were returned to Rocio's care, they would be at risk of being re-abused.

After the foster mother disclosed Luis's sexualized and aggressive behaviors, the Agency filed an amended petition on behalf of Luis under section 300, subdivision (c) alleging that Luis acted aggressively toward the family pets and had a history of "humping" his brother Efrain. The petition further alleged that Luis's behaviors required mental health treatment which his parents had been unable to provide.

In May 2008 the court held a jurisdiction and disposition hearing. The court heard testimony from social worker Firth and each of the minors. Firth had received special training in sexual molestation and sexual behaviors. She had worked with sexual abuse

victims for five years. Firth reported that the foster mother noted Aracely's behaviors sometimes were alarming. Aracely suffered from night terrors and was overheard screaming, "Stop. Don't touch me," in her sleep. Aracely also had problems with sleepwalking.

Firth discussed Luis's behaviors. Luis admitted he had hurt his foster mother's pet cat and had a history of hurting his family pets, including a dog and a rabbit. During a forensic interview, Luis admitted someone had touched his penis but he did not identify the perpetrator. Firth explained that Luis described his own masturbation as "scratching himself." Firth believed that Luis's sexualized behaviors were not age appropriate for a five-year-old child.

Efrain testified that Luis would "scratch himself" and that the behavior began when they lived at home with their parents. He did not know where Luis learned to "scratch" himself. Efrain explained that Luis scratched himself in his bed and Luis had also scratched himself against Efrain's leg. Rocio told Luis to stop his behavior but Luis did not listen to her.

Luis testified and was asked whether he knew the meaning of "scratching." He replied that he did know what it meant, but he denied ever engaging in "scratching" himself.

Aracely testified out of the presence of her parents. When questioned whether Juan had touched her vagina, Aracely stated that no one had touched her. She further denied making this disclosure to her doctor.

After considering the testimony presented at the contested hearing and the evidence presented in the Agency's reports, the court found by clear and convincing evidence that the petitions' allegations were true. The court further found it had jurisdiction over the minors. Specifically, the court found that Aracely had been sexually abused, and that Luis and Efrain were at substantial risk of molest, under section 300, subdivisions (d) and (j) respectively. The court noted the physical findings from the sexual abuse exam were consistent with Aracely's disclosures to her doctor, foster mother and social worker. Aracely consistently identified Juan as the perpetrator.

The court further found that Luis had suffered or was at risk of suffering emotional damage under section 300, subdivision (c). The court noted Dr. Berlin's statements concerning Luis's behaviors and the credibility of Efrain's testimony.

The court declared the minors dependents, removed them from Juan and Rocio's care and placed them in out-of-home care. Juan timely filed a notice of appeal.

## DISCUSSION

### I

#### JUAN'S CHALLENGE TO THE COURT'S JURISDICTIONAL FINDINGS

Juan challenges the sufficiency of the evidence to support the court's jurisdictional findings under section 300, subdivisions (c), (d) and (j).

##### *A. Standard of Review*

Section 300 jurisdiction hearings require a preponderance of evidence as the standard of proof. (§ 355, subd. (a).) In reviewing the sufficiency of the evidence on appeal, we look to the entire record for substantial evidence to support the findings of the



juvenile court. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

B.

*Section 300, Subdivision (d) Jurisdictional Findings*

Juan argues the court's findings under section 300, subdivision (d) should be reversed because Aracely's reports of abuse were based on a single incident and her statements of abuse were not consistent or credible.

A child comes within the jurisdiction of the juvenile court under section 300, subdivision (d) when the court finds, "The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse." (§ 300, subd. (d).)

Penal Code section 11165.1 defines sexual abuse as sexual assault. Further, the statute defines sexual assault as including, but not limited to, the following: "The

intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose." (Pen. Code, § 11165.1, subd. (b)(4).)

Juan asserts that the Agency misrepresented the evidence in its reports and the court erred in relying upon the reports in sustaining the allegations under section 300, subdivision (d). He claims the Agency reported that Juan had "inserted his fingers in [Aracely's] vagina," when instead, the facts only show that Juan "touched" Aracely's vagina. The Agency argues Juan has forfeited the argument raised in his opening brief on appeal.

"[A] parent's failure to object or raise certain issues in the juvenile court prevents the parent from presenting the issue to the appellate court.' [Citations.]" (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) The Agency filed its jurisdiction and disposition reports on November 2008. The Agency filed several addendum reports in anticipation of the May 2009 contested jurisdiction and disposition hearing. Thus, Juan was aware of the Agency's recommendation that the court take jurisdiction of the minors and remove them from his custody. At the jurisdiction and disposition hearing, Juan's counsel stated she had no objection to the court receiving the Agency's reports in evidence and she did not indicate that Juan considered the reports to be inaccurate. Juan has forfeited this argument on appeal.

In any event, our review of the record shows that substantial evidence supports the court's finding. Aracely made multiple disclosures indicating Juan had sexually abused her by touching her vagina with his fingers. Aracely went to see a doctor after Rocio had seen her rubbing her pubic area against chairs. Rocio also observed Aracely rubbing stuffed animals against her vagina for about one year. During her examination, the doctor asked Aracely if anyone had touched her vaginal area; she replied yes, and identified her father as the perpetrator. When the doctor asked what Juan put in her vaginal area, she said his fingers. Aracely also made the disclosures to more than one person. During her forensic interview, Aracely stated she told her doctor that "my dad touched me in my body." When asked where he touched her, Aracely pointed to her vaginal area. She reported Juan touched her under her clothes and she described that his touching hurt her. Aracely also disclosed to her foster mother that Juan had touched her and she referred to her vaginal area.

In addition to Aracely's disclosures, child abuse expert Dr. Spencer examined Aracely and concluded that the exam results were abnormal and consistent with the history provided by Aracely. Aracely's foster mother reported that Aracely experienced night terrors and at times would be heard screaming, "Stop. Don't touch me."

We acknowledge that Aracely denied the abuse occurred when she testified as a witness at trial. Also, during interviews she had with social workers and her doctor, Aracely was not always forthcoming with information about the abuse. Juan asserts Aracely's contradictory statements show that her reports of abuse lack credibility. Juan's argument, however, ignores the most fundamental precept of the relationship between the

trial and appellate courts: the trier of fact resolves issues of credibility. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 749, fn. 6; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) After considering all the evidence and observing the demeanor of the witnesses, the juvenile court was in the best position to ascertain the truth of the sexual abuse allegations as raised by Aracely. Deference to the findings of the trial court are proper because we have no power to judge the effect, value or weight of the evidence, consider the credibility of witnesses or resolve conflicts in the evidence. (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 194.) Substantial evidence supported the jurisdictional finding that Aracely was a child described by section 300, subdivision (d).

*C. Substantial Evidence Supports the Court's  
Section 300, Subdivision (c) Jurisdictional Findings*

Juan asserts the court's finding of jurisdiction under section 300, subdivision (c) should be reversed because the evidence does not show that Juan's conduct caused Luis's behavioral problems. Section 300, subdivision (c) provides a basis for juvenile court jurisdiction if "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care." (*Ibid.*) Under this provision, juvenile court intervention is appropriate when (1) the Agency can show parental fault, which caused the emotional harm; or (2) the child is suffering serious emotional damage through no fault of the parent, but the

parent is unable to provide appropriate care. (*In re Shelley J.* (1998) 68 Cal.App.4th 322, 329-330 [court properly assumed jurisdiction under § 300, subd. (c), where minor was suffering serious emotional damage due to deplorable conditions in the home and minor had no parent capable of providing appropriate care].)

Here, the amended petition alleged under subdivision (c) of section 300 that Luis was suffering or at substantial risk of suffering serious emotional damage evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior as a result of conduct by his parents. In support of this allegation, the petition stated Luis displayed aggressive behaviors toward others including family pets and further, he had a history of getting on top of Efrain and "humping" him.

Although the supporting facts alleged in the petition are minimal, they are sufficient to allege a causal connection between parental conduct and a risk of serious emotional damage to Luis. Luis acted aggressively toward family pets, including choking his pet rabbit and breaking his dog's leg, while living with his parents. This behavior continued in his foster home when Luis tried to pull out the cat's leg and tail. Efrain testified that Luis "humped" him and that this behavior began when they lived with their parents. However, Luis's behaviors persisted. While in foster care, he continued to "hump" Efrain's leg and to engage in frequent masturbation, which the social worker opined was not age appropriate behavior for a five-year-old child.

Even if the evidence did not show parental fault caused Luis's emotional damage, the evidence shows the parents were incapable of providing Luis with appropriate care, requiring juvenile court intervention. (§ 300, subd. (c).) The evidence shows Luis's

aggressive behaviors toward animals and toward Efrain began when the boys lived at home. Efrain testified his mother had seen Luis "hump" Efrain's leg. However, any efforts made in the family home to address Luis's behavioral problems had not been successful. Without intervention, Juan and the boys' mother could not provide the supervision and services Luis needed. Substantial evidence supports the court's jurisdictional findings.

*D. Substantial Evidence Supports the Court's  
Section 300, Subdivision (j) Jurisdictional Finding*

Juan also argues there was insufficient evidence to support the court's jurisdictional finding for Efrain and Luis under section 300, subdivision (j), which provides a child is within the juvenile court's jurisdiction if "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling . . . and any other factors the court considers probative in determining whether there is a substantial risk to the child."

Efrain and Luis remain at serious risk of physical harm because of the sexual abuse inflicted by Juan on Aracely in the family home. Efrain was eight years old and Luis was five years old at the time the Agency filed petitions on behalf of the minors. All minors lived together in the same home with Juan. The young ages of Efrain and Luis would make it difficult for them to protect themselves against acts of abuse. (*In re P.A.*

(2006) 144 Cal.App.4th 1339 [when a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse].) The boys were about the same age Aracely was at the time she disclosed the abuse. In addition, the boys did not have protection in the family home. Rocio's ongoing denial of the sexual abuse perpetrated against Aracely renders her unable to protect the boys from harm. Substantial evidence supports the court's jurisdictional findings under section 300, subdivision (j).

## II

### JUAN'S CHALLENGE TO THE COURT'S DISPOSITIONAL FINDINGS

Juan contends the evidence was insufficient to justify removing the minors from his custody. Before the court may order a child physically removed from his or her parent, it must find, by clear and convincing evidence, that the child would be at substantial risk of harm if returned home and that there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) The jurisdictional findings are prima facie evidence that the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. (*In re Diamond H., supra*, 82 Cal.App.4th at p. 1136, disapproved on another ground in *Renee J. v. Superior Court, supra*, 26 Cal.4th at p. 748, fn. 6; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B.G.* (1974) 11 Cal.3d 679, 699.) In this regard, the court may consider the

parent's past conduct as well as present circumstances. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.)

As discussed previously with respect to the court's jurisdictional findings, substantial evidence supports the court's findings that Juan's sexual abuse of Aracely placed the minors at substantial risk of harm. Aracely maintained Juan had abused her in the home and Juan continued to deny the allegations against him. The minors remained at risk given their young ages and they would be unable to protect themselves from abuse. The minors' mother has not been protective of them, and she allowed Juan to have contact with them after the abuse came to the attention of the Agency. In addition to the abuse, Luis suffered from behavioral problems, many of which appear to have existed before the minors had been placed in protective custody. Based on these factors, the social worker believed that the minors would remain at risk if returned home. The court's decision to remove them under these circumstances is consistent with the purposes of section 361, subdivision (c)(1) which is to prevent harm to the minors.



DISPOSITION

The orders are affirmed.

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McINTYRE, J.

WE CONCUR:

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HALLER, Acting P. J.

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McDONALD, J.